No. 21,931

IN THE

United States Court of Appeals

For the Ninth Circuit

GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated association,
Appellee.

On Appeal from the Judgment of the United States District Court for the Central District of California

BRIEF FOR THE APPELLEE

DUANE W. ANDERSON,
633 Battery Street, Suite 635,
San Francisco, California 94111,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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JURISDICTIONAL STATEMENT

The statement in appellant's brief concerning the jurisdiction of the United States District Court to hear this cause and the jurisdiction of this court to review the District Court's decision is accurate and is adopted by appellee.

STATEMENT OF THE CASE

All of the facts in this case were agreed upon and are set forth in the Pre-Trial Conference Order

signed by United States District Judge Albert Lee Stephens, Jr., on March 7, 1966 (R. 25-39, Vol. 1).

A strike against the appellant company commenced October 19, 1963. On March 7, 1964, the appellant and appellee executed a Termination of Strike and Return to Work Agreement (Plaintiff's Exhibit 2, Vol. 2) and the strike ended March 15, 1964. Appellant and appellee entered into a written collective bargaining agreement effective March 15, 1964 with respect to rates of pay, wages, hours of employment and other duties of employment of all wage-earning employees of the appellant (R. 6, Vol. 1, Plaintiff's Exhibit 1, Vol. 2).

The Return to Work Agreement dated March 7, 1964 provided, in part, that the appellant would reinstate all striking employees except those who were discharged for misconduct during the strike. The validity of any such discharges was subject to arbitration. The term of the Return to Work Agreement was from March 15, 1964 to September 15, 1964.

When the strike ended on March 15, 1964, striking employee Robert L. Cherney was reinstated by appellant and he remained a wage-earning employee of the appellant company until September 1, 1964 when he was promoted to management (R. 27, Vol. 1).

On February 4, 1965, Robert L. Cherney was dismissed from the employ of the appellant company. The appellant's reasons given for the dismissal were that (1) *Cherney had engaged in misconduct during the strike* against appellant which commenced Octo-

ber 19, 1963 and ended March 15, 1964; (2) for disloyalty to the appellant as a supervisor on and after September 1, 1964, for failure to advise appellant that he was subpoened by appellee to be its witness in an arbitration case involving the discharge of a wage-earning employee of appellant for alleged misconduct during said strike, and (3) for failure to voluntarily advise appellant of the information he had concerning the above-described arbitration case (R. 27, 28, Vol. 1).

Appellee thereupon presented to appellant a grievance protesting the discharge of Cherney and on or about February 10, 1965 appellant advised appellee that it could not accept the grievance inasmuch as the grievance procedure provisions of Article XII of the Agreement did not apply to the discharge of a supervisory employee. Appellant refused to submit the grievance to arbitration on the same ground (R. 28, Vol. 1).

Appellee thereupon initiated this action in the District Court seeking an order that the grievance concerning the dismissal of employee Robert L. Cherney is a dispute which involves the interpretation and application of the collective bargaining agreement and is within the arbitration article of the collective bargaining agreement.

Article X (Discharges and Suspensions) of the collective bargaining agreement effective March 15, 1964 (R. 6, Vol. 1) provides as follows:

> "1. Employees covered by this agreement shall not be suspended or discharged except for just cause . . . ."

Article XII (Grievance Procedure), Section 1 of said Agreement provides as follows:

> "1. The term 'grievance' as used in this contract shall mean any grievance made either by an individual employee or group of employees contending that he or they are being prejudiced as a result of misinterpretation or misapplication of any of the terms of this contract or wage schedules from time to time in effect. The above definition shall be grievances subject to arbitration."

Article XIII (Arbitration) of said Agreement provides as follows:

> "1. In the event any grievance arising hereunder cannot be resolved through negotiations between the parties hereto under the procedures hereinabove set forth, the matter shall be submitted to arbitration upon written request of the Union to the Company, and in accordance with the following procedures."

Appellee asserted in its Petition For An Order Directing Adjustment of A Dispute Under A Collective Bargaining Agreement (R. 2-7, Vol. 1) that the dismissal of employee Cherney involves a dispute as to the meaning, application and interpretation of the terms of the collective bargaining agreement, including the Recognition provisions, Article II (Non-Discrimination Clause), Article X (Discharges and Suspensions), Article XII (Grievance Procedure), Article XIII (Arbitration), Article XIV (Seniority), Article XVII (Credited Service), Article XVIII (Regular Hours), Article XXII (Vacations), Article

XXVIII (Wages), Article XXXII (Sickness and Accident Benefits), and the Group Life Insurance, Basic Hospital-Medical-Surgical Plan, Major Medical Expense, and Pension Plan provisions of the Agreement.

At the trial, the court received into evidence exhibit numbers 1 (collective bargaining agreement effective March 15, 1964), 2 (Termination of Strike and Return to Work Agreement), and 3 (Letter dated April 10, 1950, from Company District Manager Carl Von Hake to Communications of America Division No. 7 President W. A. Baker) offered by appellee bearing on the issue of the arbitrability of the dispute in question.

Following the trial, the court made its Findings of Fact and Conclusions of Law (R. 67-71, Vol. 1) and entered its Judgment (R. 72 and 73, Vol. 1) holding that the dispute concerning the discharge of employee Robert L. Cherney is within the arbitration article of the collective bargaining agreement entered into between the parties and effective March 15, 1964. Appellant's Motion to Amend Findings was denied (R. 74-86) and this appeal followed.

SUMMARY OF ARGUMENT

I. The grievance concerning the dismissal of employee Robert L. Cherney involves a dispute as to the meaning, application and interpretation of the collective bargaining agreement and is within the arbitration article of the collective bargaining agreement.

II. The Union itself has a grievance herein concerning a dispute as to the meaning, application and interpretation of the collective bargaining agreement.

ARGUMENT

I

THE GRIEVANCE CONCERNING THE DISMISSAL OF EMPLOYEE ROBERT L. CHERNEY INVOLVES A DISPUTE AS TO THE MEANING, APPLICATION AND INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT.

Employee Robert L. Cherney was admittedly discharged by the appellant company for engaging in misconduct during the strike against the Company which commenced October 19, 1963 and ended March 15, 1964. At the time of said alleged misconduct, Cherney was a wage-earning employee of the Company. The two additional grounds for discharge advanced by the Company likewise are related to strike misconduct actions which include Mr. Cherney and another wage-earning employee.

It is undisputed that if Cherney had been discharged by the Company during the course of the 150-day strike for said alleged strike misconduct, his discharge would have been subject to arbitration pursuant to Paragraph 1 of the Termination of Strike and Return to Work Agreement. Likewise, if Cherney had been discharged by the Company for any reason whatsoever following his reinstatement at the end of the strike, his discharge would clearly have been subject to arbitration pursuant to Article X of

the collective bargaining agreement while a wage-earning employee of the Company and represented by the Union. Effective September 1, 1964 Cherney was promoted to management. On February 4, 1965 he was dismissed from the employ of the Company for the above-mentioned reasons. The basic contention of the Company is that the contractual grievance and arbitration provisions of the collective bargaining agreement do not apply to this dispute because the dispute involves an employee who has been part of Management and is therefore outside the bargaining unit.

The Company and the Union totally disagree as to the meaning and interpretation of important sections of the contract. However, there is no assertion here that a supervisory employee is within the bargaining unit while he is acting as such. There is no dispute about the fact that from September 1, 1964 to February 4, 1965 Cherney was a part of Management. And there can be no dispute that from February 4, 1965 forward Cherney no longer was a part of Management. The question is: *while Cherney was within the bargaining unit* (at all times prior to September 1, 1964) *did he acquire legal rights under the Return to Work Agreement signed on March 7, 1964 and under the collective bargaining agreement effective March 15, 1964 which—after he is no longer a part of Management—he may now assert?*

Appellee Union contended in its Petition and at the trial that the dismissal of employee Cherney involves a dispute as to the meaning, application and interpre-

tation of various provisions of the collective bargaining agreement. A clear example of this involves the seniority provisions of the Agreement (Article XIV) which provides that, "All service by a *salaried* employee during the time that he is on salary shall be counted in determining his seniority under any of the provisions of this Article XIV in the event such employee is returned to an hourly wage" (emphasis supplied). The Company argues that it can put a man in a supervisory position and then a short time later, for any or no reason, discharge him. If this were true, it would penalize the Company's ability to secure competent supervisory employees from within its own organization, of which the Company publicly boasts that it does. Likewise, it would plainly violate the seniority rights acquired by the employee when he was a bargaining unit employee and a beneficiary of the rights bargained for in the collective bargaining agreement.

If seniority rights of bargaining unit employees who are promoted to supervisory positions are retained, and an arbitrator can so find under the language of the instant agreement *and* under the past practices of the Company (please see Union Exhibit 3), then they are vested rights. Such seniority rights can only be divested if done in accordance with the collective bargaining agreement.

It is submitted that a forfeiture of vested seniority rights must be clearly expressed and that there is no language in the instant Agreement indicating that seniority rights are forfeited if an employee is termi-

nated as a supervisor. Said dispute clearly involves an interpretation of the seniority, discharge, grievance, arbitration and other provisions of the contract. It is unreasonable to suppose that retained seniority rights have any value if they depend solely upon the convenience or desire of the employer. This is especially true in the instant case where the reasons for the discharge involved strike misconduct of wage-earning employees. By the appellant company's contention it could very well promote an employee one day and discharge him as a supervisory employee the next and thus completely by-pass the grievance and arbitration process and take away the employee's vested rights, including his seniority rights, in the bargaining unit. Were the employer's contention sustained, the practical consequence might well be that no bargaining unit employee would accept a promotion to a supervisory position.

Brief mention should be made of the several cases which the appellant refers to in its brief. The isolated language referred to by appellant cannot be successfully relied upon. Said cases clearly apply the principles governing labor arbitration agreements which have been delineated in the trilogy of the *Steelworker* cases decided in 1960. The underlying rationale of those holdings rests upon the federal policy to promote industrial peace through collective bargaining agreements and the recognition that a major factor in achieving that objective is the grievance and arbitration machinery established by the parties to resolve disputes. And when the parties have entered

into a comprehensive arbitration provision, as in the instant case, any challenge that a grievance is not intended to be covered must find support in unmistakably clear language of exclusion; arbitration of a particular dispute is to be ordered unless it may be said with positive assurance that it is excluded by the contract. The evidence in this case does not meet that test.

The *Boeing* case which appellant refers to is not in point since the discharge therein did *not* concern an employee who had been promoted to Management following his reinstatement after the strike. The employees involved therein were not even reinstated following said strike, as was employee Cherney in the instant case. Likewise, the Machinists did not negotiate a Return to Work Agreement as did CWA in the instant case. Furthermore, under the facts of this case, a disciplinary discharge of a striking employee was clearly subject to arbitration whether said discharge for misconduct occurred during *or* after the strike.

Appellee respectfully submits that under the facts of this case the grievance concerning the dismissal of employee Robert L. Cherney involves a dispute as to the meaning, application and interpretation of the collective bargaining agreement, of the Return to Work Agreement, and of existing past practices.

II

THE UNION ITSELF HAS A GRIEVANCE HEREIN CONCERNING A DISPUTE AS TO THE MEANING, APPLICATION AND INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT.

Section 1 of Article XII (Grievance Procedure) of the collective bargaining agreement provides as follows: "The term 'grievance' as used in the contract shall mean any grievance made either by an individual employee *or group of employees* contending that he or they are being prejudiced as a result of misinterpretation or application of any of the terms of this contract or wage schedules from time to time in effect. The above definition shall be subject to arbitration" (emphasis supplied).

While the phrase "group of employees" may identify a small number of employees, in one job classification, for example, an arbitrator can find that it may also refer to the whole bargaining unit, that is to say, the Union. Thus this language anticipates that the Union may file a grievance, as in the instant case, and that an arbitrator can find that there has been an improper application of the Agreement, as the Union understands its terms, to a given employee (Robert L. Cherney) and/or to the whole bargaining unit.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
December 27, 1967.

Respectfully submitted,
DUANE W. ANDERSON,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DUANE W. ANDERSON,
Attorney for Appellee.